No. 83-730

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WATER TRANSPORT ASSOCIATION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, CSX CORPORATION, TEXAS GAS RESOURCES CORPORATION, and EASTERN COAL TRANSPORTATION CONFERENCE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENTS, CSX CORPORATION AND TEXAS GAS RESOURCES CORPORATION, IN OPPOSITION

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QUESTION PRESENTED

The Panama Canal Act ("the Act") provides, *inter alia*, that a railroad may not "own, control, operate or have an interest in" a water carrier with which it "does or may compete." The act vests the Interstate Commerce Commission ("ICC") with exclusive jurisdiction – to be exercised only after a "full hearing" – to (i) determine whether railroads and water carriers "compete" within the meaning of the statute, and (ii) approve otherwise prohibited rail-water consolidations that are found to be in the public interest. Respondent CSX (which owns railroads) made a tender offer for stock of Texas Gas, which owns a barge line. In order to avoid any potential violations of the Act pending completion of the statutory "full hearing" before the ICC, the barge line was placed in an independent voting trust under the control and ownership of an independent trustee. The ICC denied the request of petitioner WTA that the interim use of the voting trust pending hearings be declared an unlawful acquisition by CSX of a prohibited "interest" in the barge line and that the tender offer be enjoined. The question presented is:

Whether the Court of Appeals erred in upholding, as a reasonable administrative implementation of the Act entitled to judicial deference, the ICC's refusal to prohibit use of a temporary, interim voting trust to hold the barge line separate from CSX during the relatively brief period required for the ICC to hold the "full hearing" required by law to determine (i) whether CSX and the barge line "compete" within the meaning of the Act and, if they do, (ii) whether the public interest would be served by CSX's controlling, owning and having an interest in the barge line.

PARTIES

All parties are named in the caption.[1]

[1]In accordance with amended Rule 28.1 of the Rules of the Supreme Court, the subsidiaries and affiliates of CSX Corporation and Texas Gas Resources Corporation are set forth at pp. 1a-3a of the Appendix hereto.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Statutes

Regulations

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Respondents, CSX Corporation ("CSX") and Texas Gas Resources Corporation ("Texas Gas"), oppose the petition of the Water Transport Association ("WTA") for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 4, 1983.

STATUTES AND REGULATIONS INVOLVED

The principal statutory provision addressed in the petition is section 11 of the Panama Canal Act of 1912, 49 U.S.C. § 11321 (Supp. V 1981), which is reprinted at p. 75a of Petitioner's Appendix. The seldom-invoked Act provides that a rail carrier, or person controlling a rail carrier, may not "own, operate, control or have an interest" in a water carrier with which the rail carrier "does or may compete for traffic." 49 U.S.C. § 11321(a)(1). The ICC may determine whether the Act applies – *i.e.*, whether the carriers in fact do or may compete – only after a "full hearing." 49 U.S.C. §§ 11321(a)(2), (c). The ICC may authorize an otherwise prohibited relationship between a competing water and rail carrier if it finds – also after a "full hearing" – that such relationship "will still allow that water common carrier or vessel to be operated in the public interest advantageously to interstate commerce and that it will still allow competition, without reduction, on the water route in question." 49 U.S.C. §§ 11321(b), (c).

These Panama Canal Act provisions are codified within the Interstate Commerce Act, which vests the ICC with "exclusive" authority over carrier consolidations. 49 U.S.C. § 11341(a) (Supp. V 1981). Before the 1978 recodification of the Interstate Commerce Act without substantive change, section 11341 was codified as 49 U.S.C. § 5(12) (1976), which made clear that the "exclusive and plenary" authority of the Commission extended to all transactions governed by former section 5 – including those arising under the Panama Canal Act, which was then codified as 49 U.S.C. § 5(15)-(17), as set out at p. 79a of Petitioner's Appendix.[2]

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[2]The full text of 49 U.S.C. § 11341(a) and former 49 U.S.C. § 5(12) are reproduced at pp. 4a-5a of the Appendix hereto. Although

Related provisions of the Interstate Commerce Act, 49 U.S.C. §§ 11343-44 (Supp. V 1981), are also applicable to this case. They prohibit consolidation, merger or common control of regulated carriers (including rail and water carriers) without the Commission's prior approval. These provisions are reprinted at p. 81a of Petitioner's Appendix. The Commission has promulgated rules governing independent voting trusts used to hold the stock of a carrier pending ICC hearing and review proceedings under those provisions. The Voting Trust Rules, 49 C.F.R. § 1013 (1982), are reproduced at p. 86a of Petitioner's Appendix.

STATEMENT

A. The Proposed Acquisition

Texas Gas, a diversified energy resources and holding company, owned a subsidiary operating a barge line, American Commercial Lines, Inc. ("ACL"). ACL's operations in 1982 accounted for approximately 10 percent of Texas Gas' revenues. Faced with an "unfriendly" tender offer from Coastal Corporation, at a price its Board of Directors found to be inadequate, Texas Gas entered into an agreement and plan of merger with CSX. The CSX-Texas Gas agreement called for CSX to make a competitive tender offer to Texas Gas shareholders on terms superior to Coastal's.

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the 1978 recodification placed section 11321, the Panama Canal Act provisions, in a different subchapter from section 11341, the relocation of statutory provisions was intended to effect no substantive change in the law. *See* 49 U.S.C. note prec. § 10101 (Supp. V 1981), 92 Stat. 1466, § 3 (1978).

B. The Voting Trust

Recognizing the clear need for ICC approval under the acquisition-of-control provisions of the Interstate Commerce Act, 49 U.S.C. §§ 11343-11344 – and cognizant of potential need for ICC approval under the Panama Canal Act if ACL and CSX were ultimately found to "compete" – the CSX-Texas Gas merger agreement provided that the stock of ACL would be placed in an irrevocable, independent voting trust, pending ICC review. ACL's independence and the regulatory *status quo* would thus be preserved for the period required to give the Commission an opportunity to conduct the "full hearing" required by the Act to determine (i) whether CSX and ACL in fact "do or may compete" within the meaning of section 11321(a) and, if so, (ii) whether the acquisition should nevertheless be approved by the Commission under the public interest standards of section 11321(b).

Under longstanding ICC practice developed under 49 U.S.C. § 11343-44, irrevocable voting trusts may be used to ensure that the stock of a "trusteed" company is to be independently held and voted by a trustee who is free of influence from or business arrangements with the persons placing the stock in trust.[3] The Commission has found such trusts to be a useful and effective means of preserving the regulatory *status quo* during the period needed for full ICC review and, in 1979, promulgated regulations concerning the establishment of voting trusts, their terms, and procedures for submitting them to the agency. *Voting*

[3] *See, e.g.*, B.F. Goodrich Co. v. Northwest Industries, Inc., 303 F. Supp. 53, 61 (D. Del. 1969), *aff'd*, 424 F.2d 1346 (3rd Cir. 1970), *cert. denied*, 400 U.S. 822 (1971).

Trust Rules, 44 Fed. Reg. 59,908 (1979), 49 C.F.R. § 1013.[4]

The CSX-Texas Gas voting trust agreement was drafted in accordance with the ICC's Voting Trust Rules and subject to Commission oversight. Well before the effective date of the CSX tender offer, CSX and Texas Gas advised the Commission of the proposed acquisition of ACL, stated CSX's commitment to apply for any necessary ICC approvals "as soon as practicable," and submitted a proposed voting trust agreement designed to insulate ACL from CSX during the approval process. (Petition ("Pet.") at 7a.) The parties modified the voting trust agreement in accordance with the suggestions of the ICC's Office of Proceedings, which subsequently issued an informal opinion that the voting trust arrangement "effectively insulates Texas Gas and Resources, as well as CSX, (if CSX should acquire control of Resources), from being able to exercise control over ACL." (Pet. at 8a, 106a.)

The voting trust agreement, which incorporates the ICC's regulations by reference, vests exclusive power to vote ACL's stock in the trustee, Midlantic National Bank. (Pet. at 7a, 91a-92a.) To "maintain [the trustee's] complete

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[4]The ICC's practice is consistent with that of other administrative agencies, which authorize the use of voting trusts as temporary devices to hold companies separate while the agency considers the proposed transaction under the pertinent statutory review procedure.

The Civil Aeronautics Board is one such agency. *See, e.g.,* Seaboard World Airlines, Inc. v. Tiger International, Inc., 600 F.2d 355, 365 (2d Cir. 1979). The Federal Communications Commission has permitted the use of voting trusts to secure waiver of the agency's cable television cross-ownership rules, which prohibit a cable television system from having "an interest in" certain types of television broadcasting stations. 47 C.F.R. § 76.501(a); *see, e.g.,* Westinghouse Broadcasting Co., Inc. and Teleprompter Corp., 84 F.C.C.2d 938 (1981).

independence" from CSX and Texas Gas (49 C.F.R. § 1013.1(b)), the agreement prohibits the trustee from having other business relations or disqualifying investments. (Pet. at 91a, 97a.) The trustee is forbidden from acts creating dependence or intercorporate relationships between ACL and CSX/Texas Gas, and the trust is irrevocable without ICC approval. (Pet. at 92a, 97a.) The effect of the trust is to obligate the trustee to "vote the stock in the best interests of [ACL]" rather than CSX or Texas Gas, and ACL's management reports and is responsible to the trustee. (App. 58a-59a.) The Agreement expressly provides for prompt divestiture of ACL, under specified procedures and to persons unaffiliated with CSX or Texas Gas, in the event the Commission should disapprove CSX's application to own or control the barge line. (Pet. at 95a-96a.)

C. The Commission Decision

WTA petitioned the ICC for an order declaring that the interim voting trust would violate the Panama Canal Act, even if used only as a temporary device pending completion of the Commission hearings on the proposed CSX-ACL transaction. WTA did not request an evidentiary hearing, but instead asked that its arguments be "incorporated into the record" in the full hearing on CSX's application to acquire ACL.

The ICC denied WTA's petition for declaratory order in a comprehensive and careful analysis of WTA's arguments, the Act, its legislative history and the Commission's prior decisions. (Pet. App. at 51a-67a.) The agency did not reach the question of whether CSX and ACL "compete" within the meaning of the Act and, if so, whether their relationship should be approved under the

public interest standards of section 11321(b).[5] Instead, the Commission concluded that the temporary, independent voting trust established by CSX and Texas Gas for the period of ICC review, in accordance with the standards set forth in the Voting Trust Rules, does not create a rail-water relationship of the sort prohibited by the Panama Canal Act.

The ICC stressed that, pending completion of its hearing procedures, the voting trust was "merely a temporary device designed to avoid a technical violation of the law in the context of a corporation acquisition." (Pet. at 66a.) Applying its experience with similar voting trusts used to preserve the regulatory *status quo* pending ICC review under the acquisition-of-control provisions, 49 U.S.C. § 11343-44, the agency reasoned that the interim voting trust here would succeed in its critical role of preserving ACL as an independent competitor, uninfluenced by CSX, during the ICC hearings on the proposed acquisition. (Pet. at 57a-67a.) The Commission warned that any efforts by CSX to subvert the independence of the voting trust, or to affect rail-water competition, could be promptly remedied. (Pet. at 64a and n.5, 66a.) Finally, the Commission pointed out that WTA would have ample opportunity to submit any evidence and make any arguments relevant to the proposed acquisition and the Pan-

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[5]Sections 11321(a)(2) and (c) require the Commission to conduct a "full hearing" *before* determining whether there is "competition" between ACL and CSX invoking the Act under section 11321(a), and whether the transaction merits approval under section 11321(b). Accordingly, the Commission simply "reject[ed] WTA's argument that an independent voting trust *as a matter of law* cannot insulate a carrier from its acquired 'interest' in a water carrier in the same manner as a voting trust is said to insulate a carrier from 'control' of another carrier on an interim basis pending final action in a section 11343 proceeding." (Emphasis supplied.) (Pet. at 65a.)

ama Canal Act in the subsequent proceedings on CSX's application to acquire ACL. (Pet. at 66a-67a.)

D. The Court of Appeals Decision

WTA filed its petition for review in the Court of Appeals on July 7, 1983. The panel's majority opinion of August 4, 1983 (Wald and Scalia, JJ.) affirmed the ICC's decision as a reasonable implementation of the Act. (Pet. at 1a-32a.)

The Court upheld the Commission's refusal to prohibit use of a temporary voting trust as entirely consistent with "the dual purpose of the Panama Canal Act to permit some rail-water mergers while preserving vigorous water competition." (Pet. at 29a.) In doing so, the panel majority noted the decisions of this Court calling upon reviewing courts to pay due deference to the construction by administrative agencies of their governing statutes. (Pet. at 24a-25a.) The Court of Appeals found that neither the Act's language nor its legislative history indicates that Congress has ever focused upon *"when* – before or after the acquisition – the ICC would determine the existence or absence of competition in the event a rail carrier proposed to buy a water carrier." (Pet. at 14a, 20a.) Congress' decision to amend the Act in 1940, the Court concluded, clearly expressed a policy favoring rail-water acquisitions meeting the public interest standards now codified at section 11321(b). (Pet. 18a-20a.) The Court accordingly reasoned that it would defeat the purpose of the Act as a whole to forbid – as an "interest" prohibited by the Act – an interim voting trust established to insulate a water carrier from a rail carrier pending the statutory "full hearing" necessary to determine whether the carriers "compete" and, if so, whether their consolidation should be approved. (Pet. at 25a-29a.)

WTA's sweeping, literalistic interpretation of "interests" prohibited by the Act ignored the practical problem that carriers need to establish some form of contingent relationship in order to propose a concrete transaction to the ICC for review. Without "*some* minimal leeway" in the statutory interest prohibition, the Act's provisions permitting rail-water consolidations would become a "dead letter" because of the inability of parties to present reasonably defined transactions for ICC approval. (Pet. at 25a, 27a n.30.) The Court found support for use of an interim voting trust in past ICC cases in which rail carriers had never been regarded as acquiring prohibited "interests" in water carriers when entering into elaborate purchase contracts submitted for ICC approval. (Pet. at 25a-29a.) In response to WTA's own argument that such contractual arrangements should have been used by CSX and Texas Gas, the Court found the "interests" created under the voting trust here to be essentially indistinguishable from those inherent in a purchase agreement. Both in equal measure permit the ICC to conduct its hearing process while preserving the water carrier's ability and incentive to compete with the rail carrier. (Pet. at 27a-29a.) The Court also recognized that purchase contracts are not practical in circumstances such as were involved here.[6]

The dissenting opinion (Greene, Harold, J.), whose points were addressed specifically by the majority, concluded that the Act left no room for the Commission to do

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[6]The Court of Appeals noted the particular need for devices such as the voting trust where other arrangements are unavailable. Thus it observed that to forbid such trusts "would foreclose the common acquisition device of the tender offer," the only method by which CSX could have acquired Texas Gas in the face of Coastal Corporation's competing tender offer. (Pet. at 29a.)

anything but forbid use of a voting trust prior to completion of a "full hearing." Notwithstanding the broad and exclusive jurisdiction over carrier consolidations confided to the ICC, the dissent saw no basis for deferring to the Commission's implementation of the Act in the circumstances here. The dissent proceeded in major part on the view that the ICC might not be sufficiently vigilant in guarding against competitive abuses during the time required for hearings; that CSX and ACL would ultimately be found to "compete" within the meaning of the Act; and that the proposed consolidation of ACL and CSX would adversely affect competition and should ultimately be disapproved after hearings. (Pet. at 43a-45a, 49a-50a.)

E. ICC Proceedings Since the Court of Appeals Decision

The Court of Appeals and this Court denied WTA's requests for stay. (Pet. 108a-11a.) The Court of Appeals also denied WTA's petition for rehearing and its suggestion for rehearing *en banc*. (Pet. 71a-74a.) CSX's tender offer for Texas Gas stock was consummated on August 6, 1983, shortly after all ACL stock was placed in the voting trust.

The statutory "full hearing" process is already underway. In accordance with the 90-day deadline undertaken by CSX before the Court of Appeals (Pet. at 7a n.5), CSX and ACL filed a detailed, multi-volume application (including direct evidence in written form) with the Commission on November 4, 1983. In accordance with an ICC order issued on October 19, 1983, CSX and ACL have also submitted extensive additional information bearing chiefly on questions concerning the potential impact on competition if an ACL-CSX consolidation should be approved.

After submission of comments from interested governmental agencies and protesting parties, discovery and submission of additional written evidence, there will be oral hearings. The Commission is required by law to complete its hearings on or before June 4, 1984, and to render a decision no later than September 4, 1984. *See* 49 U.S.C. § 11345(c)(3).

Throughout the hearing process, CSX and ACL are bound by a "protective order" issued by the ICC on August 30, 1983. That order establishes detailed procedures restricting the interchange of competitive information between ACL and CSX in the application and hearing process. WTA has indicated that it will participate vigorously in the hearing process, having already submitted six pleadings to the Commission. It will doubtless take advantage of its right to protest the CSX-ACL application under 49 U.S.C. §§ 11345(c)(1) and 11321(b), and to present its own evidence, cross-examine witnesses, and advance legal arguments.

REASONS FOR DENYING THE WRIT

The petition does not satisfy any of the criteria for review by writ of certiorari. The Court of Appeals upheld, in a thorough and well-reasoned decision, the order of an expert administrative agency vested with "exclusive" jurisdiction over carrier consolidations. The Commission's order does no more than permit use of a temporary, interim voting trust to preserve the regulatory *status quo* during the statutory hearing process that is already underway. The ICC's essentially procedural order represents a thoughtful implementation of the Panama Canal Act that fully accords with its policy and protects the integrity of

the statutory hearing procedures for determining the substantive issues arising under the Act.

The decision below conflicts with no decision of this or any other court and raises no important question of federal law. The Panama Canal Act has seldom been invoked during its 70 years and has been the subject of even fewer judicial decisions. There have been only a handful of reported ICC cases in which rail carriers have sought approval to acquire water carriers, and in none of these cases was the ICC's decision the subject of judicial review. (Pet. at 6a n.3, 21a-23a.) Apart from the CSX-ACL case, there are no other applications or proposed transactions involving rail and water carriers presently before the ICC.

The Court of Appeals decision accords fully with this Court's precedents requiring reviewing courts to pay due regard to the role of administrative agencies in applying their governing statutes to the cases before them. Far from violating the National Transportation Policy (Pet. at 18-23), the decision below properly recognizes that it is the ICC – through the statutory hearing process that has already begun – which in the first instance must determine on a full evidentiary record whether the CSX-ACL transaction should be authorized. WTA seeks review of what is essentially a preliminary procedural order. The issues of competition and the public interest – which are the real concern of the Act – will be fully developed before the Commission, and the ICC's decision will be subject to judicial review after it concludes evidentiary hearings. During this period of intense scrutiny the voting trust will insulate ACL from any competitive influence by CSX.

A. The Decision Below Affirms the ICC's Reasonable Implementation of the Panama Canal Act in a Manner Fully Consistent With Precedent.

WTA's petition is premised on the view that the Panama Canal Act evinces so strong an antipathy toward potential relationships between rail and water carriers as to require suspension, in this instance, of the usual principles governing judicial review of agency decisions. WTA's strained and literalistic interpretation of the Act insists that a temporary voting trust, established under ICC scrutiny for the purpose of preserving the regulatory *status quo* during statutory hearings, gives CSX a prohibited "interest" in ACL because those same statutory hearings have not yet taken place. In addition to assuming what must be proved in the hearing process itself (*i.e.*, that ACL and CSX "compete" within the meaning of section 11321(a)),[7] WTA's argument would substantially undermine the ICC's practical opportunities to administer the provisions of the Act permitting rail-water combinations.

The Court of Appeals properly recognized that it is the "dual purpose of the Canal Act to permit some rail-water mergers while preserving vigorous water competition," (Pet. at 29a), and that Congress had not "focused on the question of *when*" the hearing must be completed (Pet. at 14). Congress' 1940 amendment to the Act, which authorizes the ICC to approve rail-water relationships that are found to be consistent with the public interest, plainly

[7]Throughout the petition, WTA simply assumes that CSX and ACL "do or may compete" within the meaning of section 11321(a)(1), ignoring that a statutory "full hearing" is required to make this determination. Thus, in its Question Presented and elsewhere, WTA characterizes the Act as preventing *any* rail-water relationships whatsoever, without regard to the question of the impact on competition.

expresses a policy favoring such transactions. Yet the unduly broad interpretation of prohibited "interests" advanced by WTA would effectively preclude rail and water carriers from establishing even those minimal, attenuated and contingent relationships necessary to propose more than mere hypothetical transactions for ICC approval. As the Court of Appeals recognized, "A railroad and a water carrier are unlikely to embark on the long and costly process of seeking ICC approval without a definitive merger agreement." (Pet. at 25a.) If the ICC's jurisdiction to consider proposed consolidations of rail and water carriers is to have practical meaning, there must be means of presenting a real, concrete transaction that will actually be implemented if it receives approval from the Commission. The Court of Appeals and Commission sensibly harmonized the Act's interest and ownership prohibition (§ 11321(a)(1)) with its "full hearing" requirement and authorization provisions (§ 11321(a)(2), (b), (c)): if there is to be the hearing process contemplated by statute, "there must be *some* minimal leeway in § 11321(a)(1)'s proscription of ownership or interest, or else the merger authority of § 11321(b) becomes a dead letter." (Pet. at 27a n.30.)[8]

There was all the more reason for the Court below to accept the Commission's reasoned judgment permitting the

[8]The practical difficulties of fulfilling the statutory "full hearing" requirement without the temporary voting trust to maintain the *status quo* pending review are illustrated by the circumstances of this case. Because of the competing hostile tender offer by Coastal Corporation for Texas Gas, CSX could not have acquired Texas Gas without using the tender offer device, which would have been foreclosed without the availability of an interim voting trust to insulate ACL from CSX pending ICC hearings. The ICC properly adapted a proven mechanism to this situation to guard against the harm Congress intended to prevent – interference by railroads with rail-water competition – while the Commission conducts the "full hearing" on the proposed acquisition mandated by the Act.

temporary CSX-ACL voting trust because (i) it was established openly and in accordance with the agency's voting trust regulations, and (ii) the Commission expressly retained its "authority to remedy any attempted abuse of the trust." (Pet. at 28a n.32.) The ICC's familiarity with voting trusts and confidence in their integrity arises from many years of experience with them in carrier consolidations proposed under 49 U.S.C. §§ 11343-44. Furthermore, as the Court rightly observed, the purchase contracts used to preserved the regulatory *status quo* in past Panama Canal Act cases create no lesser "interest" than that created by the voting trust.[9]

WTA does not argue – nor could it – that the decision below conflicts with any other judicial construction of the Act. The Court below found only two "directly relevant" ICC decisions since the 1940 amendment of the Act, both of which involved purchase contracts submitted for Commission approval, and neither of which were subjected to judicial review. (Pet. at 21a-22a.) In both of the leading judicial decisions interpreting the "full hearing" requirement, the courts have refused to enjoin or set aside ICC orders on the mere allegation that the Panama Canal Act was about to be violated; each decision held that no such determination could be made in advance of the Commis-

[9]WTA's conception of "interest" prohibited by the Act would preclude *any* pre-approval commercial relationship established subject to ICC review, no matter how attenuated, including the purchase contract which it admitted below to be permissible. (Pet. at 25a, 27a n.30.) The Court of Appeals properly concluded that there is no reasoned basis for distinguishing between a purchase contract and a temporary voting trust, given the purpose of the Act. (Pet. at 25a-29a). In *both* cases, the rail carrier's motivation and opportunity to influence the water carrier's operations are checked by the short duration of the purchase contract or voting trust, the public and agency scrutiny during the hearing process, and the threat of ICC disapproval of the acquisition. (Pet. at 27a-28a.)

sion's own completion of the "full hearing" required by the statute. *See Bison Steamship Corp.* v. *United States,* 182 F. Supp. 63, 68-69 (N.D. Ohio 1960) (three-judge court); *Union Mechling Corp.* v. *United States,* 566 F.2d 722, 725-26 (D.C. Cir. 1977). WTA's assertions that past ICC decisions support its position (Pet. at 12-13) were specifically rejected by both the Commission and the Court of Appeals. (Pet. at 17a-18a, 23a n.25; 57a-59a.)

The decision of the Court of Appeals was also faithful to this Court's affirmation of the exceptionally broad authority Congress has confided in the ICC over carrier consolidations:

> "[T]he Commission may adapt [former section 5] to the actualities and current practices of the industry involved and apply it to the extent it feels necessary to protect its jurisdiction . . . without having to return to Congress for additional authority every time industry practices change." *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 125 (1962).

Here, the Commission has exercised its "exclusive" regulatory authority in a responsible manner consistent with use of a tender offer – an "industry practice" virtually unknown to Congress in 1912 when the Panama Canal Act became law.[10]

[10] In other contexts, Congress has struck the regulatory balance so as not to subject tender offers to unreasonable and unnecessary delays and interference. *See* Edgar v. MITE Corp., 457 U.S. 624, 635-40 (1982). Similarly, here the ICC has implemented the Panama Canal Act consistently with its policy of avoiding interference in the

WTA's petition, in sum, ignores the deference due the ICC's sensible and reasoned decision in this case. *EPA* v. *National Crushed Stone Ass'n,* 449 U.S. 64, 83 (1980); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). Such deference is due particularly under a statutory scheme according the Commission exclusive jurisdiction over carrier consolidations, 49 U.S.C. § 11341(a), as the Court of Appeals expressly noted (Pet. at 24a n.26). The ICC's decision is not inconsistent with any other decision interpreting the Panama Canal Act, and the Commission took into account appropriate policy considerations in implementing the statute. *Id.; see, e.g., Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 37 (1981).

There is no reason to review on certiorari the Court of Appeals' affirmance of an administrative decision that is fully in accord with established rules of administrative law and which reasonably implements the governing statute. Nor does the Commission's essentially procedural decision, which permits full development of all pertinent substantive issues in the statutory hearing process, raise any important questions meriting this Court's consideration.

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marketplace (*see* Pet. at 51a-52a), and the Court of Appeals found support for the Commission's construction of the Act in the congressional policy of the Staggers Act " 'to minimize the need for Federal regulatory control over the rail transportation system.' 49 U.S.C. § 10,101(a)(2)." (Pet. at 29a.)

B. WTA's Continuing Requests for Judicial Intervention Before Completion of the ICC's Hearing Process are Inconsistent with the National Transportation Policy.

WTA contends that the Court of Appeals decision "will substantially impair the National Transportation Policy." (Pet. at 18.) The opposite is true.

The ICC, which is the expert agency charged by Congress to implement the National Transportation Policy, has already begun evidentiary proceedings on the proposed CSX-ACL transaction. CSX and ACL have already submitted voluminous application and evidentiary materials; other parties in interest may do the same. In those proceedings, WTA may present all its legal and factual objections to the acquisition, may propose dissolution of the voting trust, and may request divestiture of the ACL stock to persons other than CSX. There could be no basis for judicial intervention before the ICC has had the chance to determine whether CSX-ACL transaction is in the public interest, particularly where there will be ample opportunity for judicial review on a full record after the ICC completes its hearing process.

WTA seeks to stop the hearings in their tracks, despite the ICC's "exclusive" jurisdiction over carrier consolidations, 49 U.S.C. § 11341(a). WTA ignores that the "mandate to achieve a balance between competing forms of transportation [set out in the National Transportation Policy] is directed not to the courts but to the Commission." *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 673 (1963). Contrary to WTA's apparent view, this Court has explained that "the National Transportation Policy is [not] a set of self-executing principles that inevitably point the way to a clear result in each case. On the contrary,

those principles overlap and may conflict, and, when this occurs, resolution is the task of the agency that is expert in the field." *Schaffer Transportation Co. v. United States,* 355 U.S. 83, 92 (1957).

While the Commission here performs the task Congress has confided to it, competition will be fully protected by the voting trust established according to the ICC's regulations, under its supervision, and subject to the ICC's intervention if there is abuse. WTA has not shown and certainly could not show that ACL is disabled as a competitor or that the water carrier industry will be harmed in this interim period. Judicial intervention pending ICC review is inappropriate in these circumstances. *See Arrow Transportation Co.* v. *Southern Ry. Co., supra,* 372 U.S. at 673.

As was the case below, WTA seeks a judicial determination that the Panama Canal Act has been violated, and that a CSX-ACL combination would endanger competition, on the basis of two maps attached to its petition (Pet. at 89a, 90a) and the proposition that both CSX and ACL are large carriers. (Pet. at 22.) Such comparative map exercises and conclusory descriptions do not begin to frame even the broad outlines of the detailed and specialized competitive analysis mandated under the Act. The Commission must consider a host of factors, including not merely the areas served by the carriers, but also "the nature of the traffic service differences, prevailing rate differences, or extremely circuitous routing of either the rail route or water route." *Southern Ry. Co. Section 5(5) Application,* 342 I.C.C. 416, 435 (1972), *aff'd sub nom., American Waterways Operators, Inc.* v. *United States,* 386 F. Supp. 799, 806 (D.D.C. 1974) (three-judge court), *aff'd per curiam,* 421 U.S. 1006 (1976).

In the final analysis, WTA's objection in this case involves the *timing* of the ICC hearings, a question of agency procedure. Such matters are peculiarly within the administrative discretion, under "very basic tenet[s] of administrative law" enunciated by this Court. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524-25, 543-44 (1978). WTA's rhetoric that the Court of Appeals decision "nullifies the Congressional mandate" and "will substantially impair the National Transportation Policy in favor of a strong independent water carrier industry" (Pet. at 23) must be seen for what it is: an attempt to avoid altogether the full ICC hearing required by law to determine whether CSX's proposed affiliation with ACL is in accordance with the Congressional intent and consistent with the National Transportation Policy.

CONCLUSION

WTA offers no significant basis for review under the standards set forth in Rule 17 of this Court's Rules or under any other standard for granting a writ of certiorari. There is no conflicting judicial or administrative decision under the seldom-invoked statutory provisions involved here. No important question of federal law is presented by the Commission's essentially procedural order, which represents precisely the kind of reasonable agency implementation of law entitled to deference by reviewing courts. The regulatory *status quo* is fully preserved by the independent voting trust while the ICC conducts the statutory "full hearing" in which all substantive issues will be fully canvassed. Any party, including WTA, may seek judicial review based upon a full evidentiary record after the Commission has completed its review and rendered findings.

The petition for a writ of certiorari should accordingly be denied.

Respectfully submitted,

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December 2, 1983

APPENDIX

APPENDIX TABLE OF CONTENTS

SUBSIDIARIES AND AFFILIATES OF CSX CORPORATION AND TEXAS GAS RESOURCES

Subsidiaries and affiliates of CSX Corporation include: CSX Beckett Aviation, Inc.; CSX Minerals, Inc.; CSX Resources, Inc.; The Chesapeake & Ohio Railway Company; The Baltimore & Ohio Railway Co.; Florida Publishing Co.; The Greenbrier Hotel, CSX Hotels, Inc.; Richmond, Fredericksburg & Potomac Railroad Co.; Seaboard Coast Line Railroad; Carolina Clinchfield & Ohio Railway; Louisville & Nashville Railroad; The Lake Erie and Detroit River Railway Co.; Western Maryland Railway Co.; Augusta & Summerville R.R. Co.; Central Railroad Co. of South Carolina; Chatham Terminal Co.; Duval Connecting R.R. Co.; Gainesville Midland Railroad Co.; Norfolk & Portsmouth Belt R.R. Co.; North Charleston Terminal Co.; The Seacoast Transportation Co.; Winston-Salem Southbend Ry. Co.; Fort Myers Southern RR Co.; Atlantic Land & Transp. Co.; Seaboard Tampa Investment Co.; First Georgia Development Co.; Beaver Street Tower Co.; Seaboard Coast Line Railway Supplies, Inc.; Cybernetics & Systems, Inc.; Evansville Corp. R.R. Co.; Evansville Connecting R.R.; Woodstock & Blackton Ry. Co.; Paducah & Illinois R.R.; Richmond Land Corp.; Fruit Growers Express Co.; Allegheny and Western Railway Co.; Western Railway of Alabama; Chicago South Shore & South Bend Railroad; Covington & Cincinnati Inter-Terminal Railroad & Transfer & Bridge Co.; The Cincinnati Inter-Terminal Railroad Company; The Lake Erie and Detroit River Railway Co.; The Baltimore and Ohio Chicago Terminal Railroad Company; Buffalo, Rochester & Pittsburgh Railway Company; Clearfield & Mahoning Railway Com-

pany; The Cincinnati, Indianapolis & Western Railroad Company; Dayton and Michigan Railroad Company; Dayton & Union Railroad Company; The Home Avenue Railroad Company; The Staten Island Railroad Corporation; The Winchester and Potomac Railroad; The Winchester and Strasburg Railroad; Baltimore & Cumberland Valley Railroad Extension Co.; Washington and Franklin Railway; The Central Railroad Company of South Carolina; Columbia, Newberry and Laurens Railroad Company; Gainesville Midland Railroad Company; Georgia Railroad; Georgia Railroad and Banking Company; South Carolina Pacific Railway Company; Tampa Southern Railroad Company; Savannah River Terminal Company; The Carrollton Railroad; Louisville, Henderson & St. Louis Railway Company; Nashville & Decatur Railroad Company; Western & Atlantic Railroad; Carolina, Clenchfield & Ohio Railway of South Carolina; Holston Land Company, Incorporated; Atlanta & West Point Railroad Company; Richmond-Washington Company; Richmond, Fredericksburg & Potomac Railroad Company.

Subisidiaries of Texas Gas Resources include: Texas Gas Transmission Corporation; American Commercial Lines, Inc.; Amcom, Inc.; American Commercial Barge Line Company; American Commercial Credit Corporation; American Commercial Leasing Company, Inc.; American Commercial Terminals, Inc.; Bauer Dredging Co., Inc.; Commercial Barge Line Company; Inland Terminals, Inc.; Inland Tugs Co.; Jeffboat, Incorporated; Louisiana Dock Company; Mac Towing, Inc.; Waterway Communications System, Inc.; Culbac Corporation; Ferma Gro Corporation; Indiana Gas Utility Corporation; Ken-Tex Energy Corporation; Texas Gas Transmission Limited; Texas Offshore Gas Transportation, Inc.; Texas

Gas Alaska Corporation; Texas Gas Development Corporation; Texas Gas Synfuel Corporation; TXG Resources, Inc.; The Cresset Corporation; Texas Gas Exploration Corporation; Texas Gas Exploration (U.K.) Corporation; Texas Gas Exploration (U.K.) Limited; Texas Gas Exploration (Australia) Corporation; Texas TransAgra Corporation; Mineral Properties, Inc.; Texas American Corporation; Texas Gas Exploration Arctic, Limited.

49 U.S.C. § 11341(a) (Supp. V 1981)

§ 11341. Scope of authority

(a) The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

49 U.S.C. § 5(12) (1976)

(12) Plenary nature of authority under section

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with

the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any powers granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.